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FEDERAL ELECTION COMMISSION
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Washington, D.C. 20463

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FIRST GENERAL COUNSEL'S REPORT

RAD REFERRAL: 15L-29R **CELA**
DATE RECEIVED: September 1, 2015
DATE OF NOTIFICATION: September 8, 2015
DATE OF LAST RESPONSE: September 23, 2015
DATE ACTIVATED: October 7, 2015

EXPIRATION OF SOL: April 27, 2020
ELECTION CYCLE: 2016

COMPLAINANT: Internally Generated

RESPONDENTS: STOP HILLARY PAC and Dan Backer
in his official capacity as treasurer

**RELEVANT STATUTES
AND REGULATIONS:** 52 U.S.C. § 30102(e)(4)
11 C.F.R. § 102.14(a), (b)

INTERNAL REPORTS CHECKED: Disclosure reports

FEDERAL AGENCIES CHECKED: None

I. INTRODUCTION

The Alternative Dispute Resolution ("ADR") office referred STOP HILLARY PAC and Dan Backer in his official capacity as treasurer ("the Committee") to the Office of the General Counsel ("OGC"), after the Committee declined to participate in the ADR program, following a referral to the ADR office by the Reports Analysis Division ("RAD") for failing to remove a current federal candidate's name from the name of the Committee.

For the reasons explained in more detail below, we recommend that the Commission open a matter under review ("MUR"), find reason to believe that the Committee violated 52 U.S.C. § 30102(e)(4), and enter into pre-probable cause conciliation with the Committee.

II. FACTUAL BACKGROUND

The Committee filed a Statement of Organization with the Federal Election Commission ("the Commission") on May 16, 2013.¹ The Committee is an unauthorized, nonconnected political committee and Dan Backer is its treasurer. Hillary Rodham Clinton filed a Statement of Candidacy for the office of President in the 2016 election cycle on April 13, 2015. On April 27, 2015, the Commission sent the Committee a Request for Additional Information ("RFAI") indicating that unless it was authorized by the candidate, it would have to remove the candidate's name from the committee's name pursuant to 52 U.S.C. § 30102(e)(4). The Committee responded on June 1, 2015, by filing a Miscellaneous Electronic Submission ("FEC Form 99") indicating that it refused to change its name because requiring such a name change would be an unconstitutionally overbroad application of 11 C.F.R. § 102.14(a), the Commission's regulation implementing § 30102(e)(4).² On June 4, 2015, a RAD analyst called Mr. Backer to inform him that if the Committee did not comply with the Commission's request, the matter could be referred for further action to the Commission, and that the Committee could further clarify the record if it wished. The Committee did so by filing an additional FEC Form 99 on June 11, 2015, which essentially reiterated its previous reasons for refusing to comply with the request.

¹ The Committee's original name was "Stop Hillary PAC." It filed an amended FEC Form 1 submission with the Commission on July 31, 2013, disclosing its Committee name as "STOP HILLARY PAC." RAD Referral at 4-5. The revised name, which is not an acronym, does not affect our analysis of this matter.

² The Committee also contended that its "open, aggressive, and blatantly obvious opposition" to Hillary Clinton vitiated any possible confusion that it is an authorized committee for Hillary Clinton or any other candidate. RAD Referral at 5-6. The Committee did not contend that it is an authorized committee, which is defined as "the principal campaign committee or any other political committee authorized by a candidate under section 30102(e)(1) of this title to receive contributions or make expenditures on behalf of such candidate." 52 U.S.C. § 30101(6).

1 On July 30, 2015, RAD referred the matter to the ADR office and the Commission
2 invited the Committee to voluntarily participate in its ADR process to resolve the issue.³ The
3 Committee declined to participate in ADR by submitting another FEC Form 99 on August 27,
4 2015, explaining that it did not intend to comply with the Commission's request that it remove
5 the candidate's name from the name of the Committee. The ADR office then referred the matter
6 to OGC for enforcement action on September 1, 2015.⁴ Upon receipt of the Referral, OGC
7 provided notice to the Committee.⁵ On September 23, 2015, the Committee filed a Response
8 which argued that § 30102(e)(4) and the Commission's regulations at 11 C.F.R. § 102.14
9 implementing that provision are unconstitutional, both on their face and as applied to political
10 committees that unambiguously oppose the election of particular candidates.⁶

11 III. FACTUAL AND LEGAL ANALYSIS

12 A. Legal Standard

13 The Federal Election Campaign Act of 1971, as amended ("the Act"), requires that "any
14 political committee which is not an authorized committee . . . shall not include the name of any
15 candidate in its name."⁷ The Commission has construed the term "name" to "include[] any name
16 under which a committee conducts activities, . . . including a special project name." 11 C.F.R.

³ RAD referred the Committee to the ADR office pursuant to the *2015-2016 RAD Review and Referral Procedures for Unauthorized Committees* at 35 (Standard 2).

The ADR matter, ADR 776, was closed when the ADR office referred the matter to OGC.

⁴ The ADR office referred the Committee to OGC pursuant to Commission procedures to refer a matter to OGC following a respondent's refusal to participate in the ADR program.

⁵ Letter from Jeff S. Jordan, Asst. Gen. Counsel, CELA, FEC to Dan Backer, Treasurer, STOP HILLARY PAC (Sept. 8, 2015); see also *Agency Procedure for Notice to Respondents in Non-Complaint Generated Matters*, 74 Fed. Reg. 38,617 (Aug. 4, 2009).

⁶ The Committee also filed a lawsuit against the Commission in the U.S. District Court for the Eastern District of Virginia on September 22, 2015, raising essentially the same arguments it raises in its Response in this enforcement matter. See *Stop Hillary PAC v. FEC*, Case No. 1:15-cv-01208-GBL-IDD (E.D. Va.).

⁷ 52 U.S.C. § 30102(e)(4).

1 § 102.14(a). There are several exceptions to the Commission's regulation implementing
2 § 30102(e)(4), including one that provides: "An unauthorized political committee may include
3 the name of a candidate in the title of a special project name or other communication if the title
4 clearly and unambiguously shows opposition to the named candidate."⁸ There is no exception,
5 however, allowing committee names to include the name of a declared federal candidate.⁹

6 **B. Discussion**

7 The Committee does not dispute the fact that its name includes the name of a declared
8 candidate for federal office although it is not the authorized committee of that candidate. The
9 Committee concedes as much in its Response:

10 At the time [Dan] Backer prepared and filed the Statement of
11 Organization for Stop Hillary PAC, he was aware that the PAC's
12 name contained a reference to "Hillary," which was intended as a
13 reference to then-Secretary of State Hillary Rodham Clinton. At
14 that time, Backer also was aware of 52 U.S.C. § 30102(e)(4)'s
15 prohibition on including candidate names in the names of PACs.
16 He believed that Hillary Rodham Clinton was certain to seek the
17 2016 Democratic Party nomination for the office of President of
18 the United States. Hillary Rodham Clinton officially became a
19 candidate for the office of President of the United States on or
20 about April 13, 2015.¹⁰
21

⁸ 11 C.F.R. § 102.14(b)(3).

⁹ The special projects exception applies only to the title of a special project or communication, such as a website or fundraising solicitation, not to a political committee's name. Advisory Op. 2015-04 (Collective Actions PAC) at 3. See Advisory Op. 1995-9 (NewtWatch PAC) at 6 ("The Commission concludes that the term "NewtWatch" may not be used as part of the Committee's name. In contrast to the committee name restrictions, a candidate's name may be used in the title of a special project operated by an unauthorized committee if the project title clearly and unambiguously shows opposition to the named candidate.").

The Commission recently issued an Advisory Opinion in which it discussed § 30102(e)(4) in the context of a committee's online activities, reiterating that the "only relevant exception to the ban on using a candidate's name in the name of [a special] project or communication is . . . if the title clearly and unambiguously shows opposition to the named candidate." Advisory Op. 2015-04 at 3. In a recent lawsuit challenging this Advisory Opinion, a federal district court denied the plaintiff's motion for a preliminary injunction on the ground that the plaintiff failed to demonstrate a likelihood of success on the merits. See *Pursuing America's Greatness v. FEC*, No. 15-cv-1217, 2015 WL 5675428, at *2 (D.D.C. Sept. 24, 2015). However, neither the Advisory Opinion nor the district court litigation challenging it directly addresses the issue raised in this matter because they do not challenge the prohibition on using a federal candidate's name *in a committee name*.

¹⁰ Resp. at 4.

1 In short, the Committee acknowledges that its name includes the name of a current
2 federal candidate, and that by refusing to remove candidate Hillary Clinton's name from its
3 committee name, it is in violation § 30102(e)(4) of the Act and Commission regulations
4 implementing that provision.¹¹ We therefore recommend that the Commission open a MUR and
5 find reason to believe in this matter.¹²

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¹¹ A knowing and willful violation of the Act is one in which the "acts were committed with full knowledge of all the relevant facts and a recognition that the action is prohibited by law." 122 Cong. Rec. 12,197, 12,199 (May 3, 1976); see *United States v. Danielczyk*, 917 F. Supp. 2d 573, 579 (E.D. Va. 2013) (quoting *Bryan v. United States*, 524 U.S. 184, 195 (1998) (holding that government needs to show only that the defendant acted with knowledge that conduct was unlawful, not knowledge of specific statutory provision violated, to establish a willful violation)).

Although the facts provide a possible basis for finding that the Committee knowingly and willfully violated the Act, we do not recommend that the Commission make such a finding in this matter. Specifically, we note that the Committee first adopted its name at a time when Hillary Clinton was not a candidate for federal office and, shortly after being notified of the need to change its name due to Senator Clinton's candidacy, filed a claim in federal district court alleging that § 30102(e)(4) is unconstitutional. Under these circumstances, we believe that the Commission should exercise prosecutorial discretion with regard to pursuing a knowing and willful violation.

¹² See also First Gen. Counsel's Report, MUR 5889 (Republicans for Trauner) (recommending that the Commission find reason to believe that Respondents violated [52 U.S.C. § 30102(e)(4)]); Amended Certification, MUR 5889 (Republicans for Trauner) (Commission decided by a vote of 5-0 to find reason to believe that Respondents violated [52 U.S.C. § 30102(e)(4)]).

V. RECOMMENDATIONS

1. Open a MUR.
2. Find reason to believe that STOP HILLARY PAC and Dan Backer in his official capacity as treasurer violated 52 U.S.C. § 30102(e)(4).
3. Approve the attached Factual and Legal Analysis.
4. Enter into conciliation with STOP HILLARY PAC and Dan Backer in his official capacity as treasurer prior to a finding of probable cause to believe.
5. Approve the attached conciliation agreement.
6. Approve the appropriate letter.

Date:

11/24/15

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Kathleen Guith
Acting Associate General Counsel
for Enforcement

Mark Shonkwiler
Mark Shonkwiler
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Attorney

Attachments

1. Factual and Legal Analysis

1 **FEDERAL ELECTION COMMISSION**

2 **FACTUAL AND LEGAL ANALYSIS**

3 RESPONDENTS: STOP HILLARY PAC and Dan Backer MUR____
4 in his official capacity as treasurer
5

6 **I. GENERATION OF MATTER**

7 This matter was generated based on information ascertained by the Federal Election
8 Commission ("Commission") in the normal course of carrying out its supervisory
9 responsibilities. *See* 52 U.S.C. § 30109(a)(2). The Alternative Dispute Resolution ("ADR")
10 office referred STOP HILLARY PAC and Dan Backer in his official capacity as treasurer
11 ("Committee" or "Respondent") to the Office of the General Counsel ("OGC"), after the
12 Committee declined to participate in the ADR program. Respondent was referred to the ADR
13 office by the Reports Analysis Division ("RAD") for failing to remove a current federal
14 candidate's name from the name of the Committee, as required under 52 U.S.C. § 30102(e)(4).

15 Based on a review of the Referral and the Respondent's submission, the Commission
16 finds reason to believe that the Respondent violated the Federal Election Campaign Act of 1971,
17 as amended ("Act").

18 **II. FACTUAL AND LEGAL ANALYSIS**

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C. Discussion

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In short, the Committee acknowledges that its name includes the name of a current federal candidate, and that by refusing to remove candidate Hillary Clinton's name from its committee name, it is in violation § 30102(e)(4) of the Act and Commission regulations implementing that provision. Accordingly, the Commission finds reason to believe that STOP HILLARY PAC and Dan Backer in his official capacity as treasurer violated 52 U.S.C. § 30102(e)(4).

The Commission recently issued an Advisory Opinion in which it discussed § 30102(e)(4) in the context of a committee's online activities, reiterating that the "only relevant exception to the ban on using a candidate's name in the name of [a special] project or communication is . . . if the title clearly and unambiguously shows opposition to the named candidate." Advisory Op. 2015-04 at 3. In a recent lawsuit challenging this Advisory Opinion, a federal district court denied the plaintiff's motion for a preliminary injunction on the ground that the plaintiff failed to demonstrate a likelihood of success on the merits. *See Pursuing America's Greatness v. FEC*, No. 15-cv-1217, 2015 WL 5675428, at *2 (D.D.C. Sept. 24, 2015). However, neither the Advisory Opinion nor the district court litigation challenging it directly addresses the issue raised in this matter because they do not challenge the prohibition on using a federal candidate's name *in a committee name*.

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